AND
BRIEFS

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In the Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, ET AL.,
Petitioners,

v.

ERIC T. SCHNEIDERMAN, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE UNITED STATES PUBLIC INTEREST RESEARCH GROUP EDUCATION FUND, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

United States Public Interest Research Group Education Fund, Inc. ("U.S. PIRG Education Fund") is a 501(c)(3) independent, non-partisan organization that works on behalf of consumers and the public interest. Through research, public education, and outreach, it serves as a counterweight to the influence of powerful special interests that threaten the public's health, safety, or well-being. U.S. PIRG Education Fund participates as amicus curiae in cases that will have a substantial impact on consumers and the public interest, such as this one. U.S. PIRG Education Fund has long advocated on the issue of swipe fee reform. U.S. PIRG Education Fund believes that cash customers should not pay more to subsidize credit card reward programs and supports efforts to make the costs of credit transparent to consumers.

INTRODUCTION AND SUMMARY OF ARGUMENT

New York's no-surcharge law is exactly the kind of "highly paternalistic approach" that this Court established the commercial-speech doctrine to forbid. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). The law "keep[s] the public in ignorance" about important price information. *Id.* It distorts the marketplace, leading to higher prices for everyone and hitting the poor the hardest. *See id.* at 763-64. It does so in the service of goals that are unrelated to protecting the

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[1] This brief was not authored in whole or in part by counsel for a party and no one other than amici curiae and its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk.

public. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 n.9 (1980). And most insidiously, it hides those higher prices and the reason for them from consumers. *See id.* In that way, the law insulates itself from public disapproval and challenge.

Those circumstances make this a paradigm case for application of *Central Hudson*'s "intermediate scrutiny" test for restrictions on commercial speech. *See id.* at 566. Some amici for petitioner, however, are not content to argue that the law is unconstitutional under *Central Hudson*. Seizing on recent decisions of this Court that have created uncertainty over the relevant test, these amici ask the Court to instead review the law under the exacting strict-scrutiny standard. *See* Albertson's, et al. Br. on Pet.; *see also* Cato Inst. Br. on Pet.

To do so would be both unnecessary and unwise. It would be unnecessary because, as amici agree, New York's no-surcharge law fails even under intermediate scrutiny. Where, as here, a state law attempts to drive consumer behavior by keeping consumers in the dark about relevant price information, the law will virtually always fail *Central Hudson*.

And it would be unwise because it would ignore the "common-sense differences" between commercial and other forms of speech that undergird the commercial-speech doctrine. Though sometimes maligned, *Central Hudson* has proved itself flexible enough to strike down unjustified speech restrictions while leaving room for legitimate economic regulation of misleading and coercive commercial speech. That this Court has upheld only a handful of commercial-speech restrictions belies amici's concern that the test insufficiently protects First Amendment values.

For these reasons, this Court should hold New York's no-surcharge law unconstitutional under the *Central Hudson* test.

ARGUMENT

I. The No-Surcharge Law Is a Classic Example of an Unconstitutional Restriction on Commercial Speech.

New York's no-surcharge law deliberately keeps consumers in the dark about important pricing information, and does so for reasons unrelated to protecting those consumers from false advertising or other harm. This Court has encountered such paternalistic laws before and has consistently held them to be unconstitutional restrictions on commercial speech. *See 44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *Va. State Bd. of Pharmacy*, 425 U.S. 748. New York's law is a paradigmatic example of an unjustified commercial-speech restriction. It, too, is unconstitutional.

A. This Court's protection of commercial speech "is justified principally by the value to consumers of the information." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *see also Cent. Hudson*, 447 U.S. at 563 ("[T]he First Amendment's concern for commercial speech is based on the informational function of advertising."). The commercial-speech doctrine grew out of this country's consumer movement in the 1970s and "was forged as a tool of consumer protection to secure the value of commercial speech to society." Shanor, *The New Lochner*, 2016 Wis. L. Rev. 133, 143-44 (2016). Thus, the plaintiffs in *Virginia State Board of Pharmacy*, which for the first time recognized a First Amendment interest in commercial speech, were not businesses, but consumers.

425 U.S. at 753-54. And this Court's decision in that case "reflected the conclusion that the same interest that supports regulation of potentially misleading advertising, namely, the public's interest in receiving accurate commercial information, also supports an interpretation of the First Amendment that provides constitutional protection for the dissemination of accurate and nonmisleading commercial messages." *44 Liquormart*, 517 U.S. at 496 (opinion of Stevens, J.).[2]

New York's no-surcharge law undermines that constitutional interest by depriving consumers of highly relevant commercial information. The law prohibits merchants from disclosing that they have added an extra cost to the price of goods or services to cover the fees on credit-card transactions—so-called "swipe fees." *See* N.Y. Gen. Bus. Law § 518; Levitin, *Priceless? The Social Costs of Credit Card Merchant Restraints*, 45 Harv. J. on Legis. 1, 9-10, 9 n.35 (2008). The law

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[2] *See also United States v. United Foods, Inc.*, 533 U.S. 405, 426 (2001) (Breyer, J., dissenting) ("This Court has described the First Amendment's basic objective as protection of the consumer's interest in the free flow of truthful commercial information."); *Edenfield v. Fane*, 507 U.S. 761, 766 (1993) ("First Amendment coverage of commercial speech is designed to safeguard" society's "interest[] in broad access to complete and accurate commercial information"); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 432 (1993) (Blackmun, J., concurring) ("[T]his Court's emphasis [is] on the First Amendment interests of the listener in the commercial speech context."); *Va. State Bd. of Pharmacy*, 425 U.S. at 756 (the First Amendment's protection of commercial speech "is a protection enjoyed by ... recipients of the information"); Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1, 14 (2000) (noting that the Court has "focused its analysis on the need to receive information, rather than on the rights of speakers.").

thus restricts giving consumers information about the prices they pay on everyday goods and services.

This Court has been particularly solicitous of the free flow of truthful price information—that is, the public's right "to know who is charging what." *Va. State Bd. of Pharmacy*, 425 U.S. at 765. In *Virginia State Board of Pharmacy*, for example, the Court struck down a ban on advertising the prices of prescription drugs. "[T]he particular consumer's interest in the free flow of commercial information," the Court wrote, "may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 770.[3]

By depriving the public of information, the no-surcharge law imposes a severe economic cost. When merchants are denied the ability to designate additional prices as "surcharges," the only way they can pass the cost of swipe fees on to consumers is by raising prices across the board. *See* Levitin, *Priceless?*, 45 Harv. J. on Legis. at 17, 27-28.[4] The impact on consumers is enormous. Merchants in the United States

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[3] *See also 44 Liquormart*, 517 U.S. 484 (price of alcoholic beverages); *Bates*, 433 U.S. 350 (price of lawyer services); *Carey v. Population Svcs. Int'l*, 431 U.S. 678 (1977) (availability and price of contraceptives).

[4] Theoretically, merchants could achieve the economic equivalent of a surcharge by raising base prices and offering a discount to non-credit users. Levitin, *Priceless?*, 45 Harv. J. on Legis. at 18, 19. In practice, that does not happen. The reason is that "consumers react very differently to surcharges and discounts." *Id.* at 19; *see also id.* at 2. Because of a well-known cognitive bias, "people have stronger reactions to losses and penalties than to gains." *Id.* at 19. Consumers thus "react more strongly to surcharges (perceived as penalties) than to discounts

rack up more than *$50 billion* in swipe fees each year, most of which are passed on to the public in the form of higher prices. *See id.* at 2. The effects of New York's no-surcharge law are thus farther reaching than the price-advertising ban in *Virginia State Board of Pharmacy*. There, the ban only affected the price of prescription drugs. *See* 425 U.S. at 754 & n.11, 765 n.20 (Virginia's ban on price advertising cost consumers millions of dollars every year). Here, the ban affects *every* kind of good or service that that can be purchased with a credit card.

Moreover, this vast transfer of wealth is highly regressive. Levitin, *Priceless?*, 45 Harv. J. on Legis. at 35-36. It is more affluent consumers who typically pay with credit cards, and those consumers at least get some of the fees back in the form of cash refunds, airline miles, and other rewards-program benefits. *See id.* at 15-16, 34-36. Those who pay with cash, check, or food stamps—disproportionately the poor—do not. *Id.* at 34-36. Thanks to the no-surcharge law, the poor thus pay for the credit-card fees and the perks of the wealthy. *See Va. State Bd. of Pharmacy*, 425 U.S. at 763 ("Those whom the suppression of prescription drug price information hits the hardest are the poor ... ."); *Bates*, 433 U.S. at 398 (noting that "low- and middle-income citizens" have a hard time "finding counsel willing to serve at reasonable prices."). In the worst case, "frequent flier miles are subsidized by food

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(perceived as serendipitous gains)" despite the economic equivalence of the two concepts. *Id.* Moreover, "[c]ash discounts do not have the full signaling effects of credit surcharges," which "alert the consumer to the extra cost of different payment systems." *Id.* at 21.

stamp recipients." Levitin, *Priceless?*, 45 Harv. J. on Legis. at 36.

And the law does not just impact individual consumers; it imposes a societal cost as well. Commercial speech—and particularly price information—is "indispensable to the proper allocation of resources in a free enterprise system," helping to ensure that the "numerous private economic decisions" making up the economy, "in the aggregate, [are] intelligent and well informed." *Va. State Bd. of Pharmacy*, 425 U.S. at 765. When laws hide price information from consumers, that system quickly breaks down. The law struck down in *Virginia State Board of Pharmacy*, for example, "insulate[d]" pharmacists "from price competition" and "open[ed] the way for [them] to make a substantial, and perhaps even excessive, profit in addition to providing an inferior service." *Id.* at 769. As a result, drug prices varied widely from location to location, even in the same area. *Id.* at 754 & n.11, 765 n.20.

New York's no-surcharge law has a comparable effect on the market. Because the cost of credit is hidden from consumers, there is no competition among credit-card companies to offer lower swipe fees. *See* Levitin, *The Antitrust Super Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 Berkeley Bus. L.J. 265, 288-89 (2006). Consumers do not choose which credit card to use based on the swipe fee charged, and they use credit cards even when less-expensive alternatives like cash, checks, and debit cards are available. *See id.* at 272-74. The upshot of this lack of competition is that swipe fees in the United States are among the highest in the world. Bradford & Hayashi, Fed. Reserve Bank of

Kansas City, *Developments in Interchange Fees in the United States and Abroad* 1 (Apr. 2008). "[T]he efficient allocation of resources depends upon informed consumer choices." *Friedman v. Rogers*, 440 U.S. 1, 8-9 (1979). The no-surcharge law deprives consumers of those choices.

B. The state's claimed reasons for adopting the surcharge ban are unrelated to preventing false or misleading speech or otherwise protecting consumers. On the contrary, the law prohibits merchants from *truthfully* disclosing the cost of credit. "Precisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth." *44 Liquormart*, 517 U.S. at 503 (opinion of Stevens, J.). That is true here.

New York contended below that the no-surcharge law is necessary because labeling the price difference between cash and credit as a credit-card surcharge instead of as a cash discount will "make consumers unhappy." NY CA2 Br. 9. "[C]ustomers view such surcharges as unjustified penalties," the state argued, and the resulting "consumer anger" could "dampen retail sales." *Id.* But surely customers would also be angry if they learned they are *already* effectively paying surcharges in the form of higher base prices. Hiding that ugly truth from consumers to make them happy—and keep them shopping—is the purest form of paternalism.

This Court has "rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to

prevent members of the public from making bad decisions with the information." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002). A state thus may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." *Va. State Bd. of Pharmacy*, 425 U.S. at 773. For example, the state in *Virginia State Board of Pharmacy*, like the state here, argued that lifting the ban on price advertising would adversely affect consumers' shopping habits—in that case, by causing them to "choose the low-cost, low-quality service" and thus "drive the 'professional' pharmacist out of business." *Id.* at 769. Those fears, however, did not justify "keeping the public in ignorance." *Id.* at 770. As the Court explained:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.

Id.; *see also Bigelow v. Virginia*, 421 U.S. 809, 827-28 (1975) (state interest in "shielding its citizens from information" about lawful activities "entitled to little, if any, weight").

New York's decision to shield consumers from information about the cost of credit similarly denies them the ability to "perceive their own best interests." *Va. State Bd. of Pharmacy*, 425 U.S. at 770. As consumer advocates have long argued, if consumers knew about the costs of using credit they might choose to

avoid those costs by using less-expensive payment methods. *See Cash Discount Act, 1981: Hearings on S. 414 Before the S. Banking Comm.*, 97th Cong. 92 (1981) (testimony of Jim Boyle for Consumer Federation of America) (requiring merchants to disclose surcharges would "help consumers to make informed judgments about whether to buy with cash or with credit"). That, in turn, would drive competition to lower swipe fees, leading to lower prices and—in the long run—happier consumers. *See* Merchant, *Merchant Restraints: Credit-Card-Transaction Surcharging and Interchange-Fee Regulation in the Wake of Landmark Industry Changes*, 68 Okla. L. Rev. 327, 370 (2016).

New York also argued below that the no-surcharge law was justified because "sellers can and often will use surcharges to extract windfall profits, thus reaping payments out of proportion to the value of the goods or services they provide." NY CA2 Br. 6. But the market can ordinarily be trusted to keep prices in check. Merchants who unnecessarily raise prices do not make windfall profits—they lose business.

Even if merchants could somehow get away with imposing higher fees than necessary, that is no reason to require merchants to bundle the fees into their base prices rather than disclosing them as a "surcharge." Doing so does not stop merchants from imposing extra fees; it just hides those fees from consumers. Indeed, it is the resulting lack of price competition that allows credit-card companies to get away with *already* making billions of dollars in windfall profits every year. *See* Levitin, *Priceless?*, 45 Harv. J. on Legis. at 2, 27.

The state's justification closely resembles the one this Court condemned in *Rubin v. Coors Brewing Co.*,

514 U.S. 476 (1995). There, the federal government argued that banning alcohol-content information on beer bottles was necessary to prevent escalating alcohol content. *Id.* at 479. The Court held the law unconstitutional because the government could have accomplished its stated goal by "directly limiting the alcohol content of beers" rather than by restricting speech. *Id.* at 490-91. Here, New York argues that banning disclosure of surcharges is necessary to prevent escalation of those charges. As in *Rubin*, the state could have accomplished that goal without restricting speech, in this case by directly limiting the amount merchants can impose as a surcharge. Australia, for example, adopted just such a limit after surcharges were legalized in that country. *See* Levitin, *Priceless?*, 45 Harv. J. on Legis. at 51-52.

The state did make one consumer-protection argument in favor of the law below, contending that surcharges "make it easier for sellers to advertise a low regular price and then impose surprise credit-card fees at the point of sale." NY CA2 Br. at 9-10. That hypothetical practice would indeed be misleading, but it has nothing to do with the no-surcharge law. Unscrupulous merchants can charge more than their advertised prices with or without the law, and, either way, doing so would surely violate New York's false-advertising statutes. *See* N.Y. Gen. Bus. Law §§ 350 & 350-a.

In any event, the possibility that merchants *might* use surcharges in a misleading way does not justify the ban. A state "may not place an absolute prohibition on certain types of potentially misleading information ... if the information also may be presented in a way that is not deceptive." *In re R.M.J.*, 455 U.S.

191, 203 (1982). Here, rather than forcing merchants to *conceal* surcharges from consumers, the state could address the risk of false advertising by requiring merchants to *disclose* them in advertisements, as at least one state already does. *See* Minn. Stat. § 325G.051(1)-(a). That was the alternative that the Federal Reserve Board, the Federal Trade Commission, and consumer groups recommended to Congress when it considered the federal no-surcharge law. *See Cash Discount Act Hearings* at 10 (Testimony of Nancy Teeters, Federal Reserve Board) ("[R]ecommend[ing] for subcommittee consideration a very simple rule: ... that the availability of the discount or surcharge be disclosed to consumers."); *id.* at 91, 126-27.

New York's various justifications aside, the real reason for the no-surcharge law is probably one that the state never acknowledges. It seems likely that the law was designed to benefit—at the expense of consumers—the credit-card companies that lobbied for its passage. As one consumer advocate told Congress during consideration of the federal no-surcharge law, the "ban constitutes special interest legislation that serves the interest of only one special interest group, the credit card industry." *See id.* at 97 (testimony of Ellen Broadman for Consumers Union). And "[n]ot only that, but it serves this one special interest group at the expense of the American public, to the tune of billions of dollars each year." *Id.*; *see also id.* at 91 (testimony of Jim Boyle for Consumer Federation of America) ("The surcharge ban is special interest legislation advocated by groups who push the overutilization of credit cards"). That explains why it was only industry groups that supported the law, while consumer groups uniformly opposed it. *See, e.g., id.*

C. Worst of all from a First Amendment perspective is the way the law insulates itself from public scrutiny and challenge. Just as commercial speech is "indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered." *Va. State Bd. of Pharmacy*, 425 U.S. at 765. But when a state restricts commercial speech in pursuit of policy goals unrelated to protecting consumers, "a ban on speech could screen from public view the underlying governmental policy." *Cent. Hudson*, 447 U.S. at 566 n.9; *see also* Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. at 11. If, for example, the government were to ban advertising the price of health-care plans, it might also hide fundamental problems with the health-care system and thus discourage needed reforms. *See id.*

So too here. Because of the surcharge ban, most consumers are unknowingly paying higher prices for goods and services while believing—wrongly—that credit cards are free. *See* Merchant, *Merchant Restraints*, 68 Okla. L. Rev. at 327. As long as people do not know that they are paying banks and credit-card companies for everyday goods and services, no pressure can be brought to bear to change that system. And because the no-surcharge law hides its effects from the public, the law itself is shielded from scrutiny. By "obscur[ing] [the] underlying government policy," the law thus "not only hinder[s] consumer choice, but also impede[s] debate over central issues of public policy." *44 Liquormart*, 517 U.S. at 503 (opinion of Stevens, J.) (internal quotation marks omitted).

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"The First Amendment directs [courts] to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *Thompson*, 535 U.S. at 375. New York's no-surcharge law is just such a regulation—a classic example of an unjustified and unconstitutional restriction on commercial speech.

II. This Court Should Evaluate the Law Under Intermediate Scrutiny.

Because this is a classic commercial-speech case, intermediate scrutiny under *Central Hudson* is the proper test. But two recent decisions by this Court, *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), and *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), have created confusion among courts and commentators about the continuing validity of that test. Relying on those cases, other amici for petitioner invite the Court to use this case as an opportunity to definitively cast aside *Central Hudson*. Because New York's law is a "content-based" restriction on speech, they argue, the much tougher strict-scrutiny standard should instead apply. *See* Albertson's, et al. Br. on Pet. at 20-23; *see also* Cato Inst. Br. on Pet. at 8-10. The Court should decline amici's invitation, both because there is no need to reach the issue in this case and because there are good reasons to retain the intermediate-scrutiny test.

A. In *Sorrell*, this Court held unconstitutional a Vermont law that restricted the sale and use of pharmacy records. 564 U.S. at 557. The Court concluded that the law imposed a "speaker- and content-based burden on protected expression." *Id.* at 571. "In the

ordinary case," the Court wrote, "it is all but dispositive to conclude that a law is content-based," and "[c]ommercial speech is no exception." *Id.* at 566, 571. But rather than basing its holding on the speaker- and content-based nature of the rule, the Court declined to decide the standard of scrutiny because the result would have been "the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny" applied. *Id.* at 571. The decision led some to conclude that the Court intended to replace, or signal its readiness to replace, *Central Hudson*.[5]

And in *Reed*, the Court again emphasized that content-based speech restrictions are subject to strict scrutiny, without expressly exempting commercial speech from that rule. 135 S. Ct. 2218. Following *Reed*, litigants, including amici here, have argued that the Court intended to require strict scrutiny for *all* content-based restrictions on speech, commercial or otherwise. *See* Note, *Free Speech Doctrine After Reed v. Town of Gilbert*, 129 Harv. L. Rev. 1981, 1986-87 (2016).

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[5] The Ninth Circuit, for example, concluded that *Sorrell* "modified the *Central Hudson* test for laws burdening commercial speech," requiring something more than intermediate scrutiny when the restriction is content- or speaker-based. *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638, 648 (9th Cir. 2016), *reh'g granted*, *Retail Digital Network, LLC v. Gorsuch*, 2016 WL 6790810 (9th Cir. Nov. 16, 2016); *see also, e.g.*, *Sorrell*, 564 U.S. at 588 (Breyer, J., dissenting) (noting that the decision "suggest[s] a standard yet stricter than *Central Hudson*"); *United States v. Caronia*, 703 F.3d 149, 164 (2d Cir. 2012) (concluding that *Sorrell* required a "two-step analysis" but "did not decide the level of heightened scrutiny to be applied"); Thomson, *Whither Central Hudson? Commercial Speech in the Wake of Sorrell v. IMS Health*, 47 Colum. J.L. & Soc. Probs. 171, 173 (2013).

Amici's argument, if adopted, would effectively mean the end of the commercial-speech doctrine. As Justice Breyer pointed out in his dissent to *Sorrell*, "[r]egulatory programs necessarily draw distinctions on the basis of content," and commonly "affect[] only a class of entities, namely, the regulated firms." 564 U.S. at 589. Thus, most of this Court's past commercial-speech cases have involved laws that were both content- and speaker-based. *See, e.g.*, *Thompson*, 535 U.S. at 364-65 (prohibition on advertising compounded drugs by doctors and pharmacists); *44 Liquormart*, 517 U.S. at 489-90 (prohibition on advertising the price of alcoholic beverages by alcohol vendors and news media); *Edenfield*, 507 U.S. at 770 (prohibition on soliciting business by accountants); *Va. State Bd. of Pharmacy*, 425 U.S. at 749-50 (prohibition on advertising the price of drugs by pharmacists). Yet, the Court did not apply strict scrutiny.

In any case, there is no need for this Court to decide the question here. The Court "do[es] not ordinarily reach out to make novel or unnecessarily broad pronouncements on constitutional issues when a case can be fully resolved on a narrower ground." *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 184 (1999). Such a narrow ground is readily available in this case because "*Central Hudson* ... provides an adequate basis for decision." *Id.* Moreover, as New York has acknowledged, "few if any additional state laws are likely to be affected" by the Court's resolution of the question presented here." BIO 15.

This Court has expressed doubts about the continuing validity of *Central Hudson* before. Since its inception, this Court's commercial-speech test has faced criticism for not being strict enough. *See, e.g., Cent.*

Hudson, 447 U.S. at 573-75 (Blackmun, J., concurring). But the Court in the past has always been able to resolve cases like this one without resorting to a new, stricter form of scrutiny. *See Discovery Network*, 507 U.S. at 416 n.11 ("Because we conclude that Cincinnati's ban on commercial newsracks cannot withstand scrutiny under *Central Hudson* ..., we need not decide whether that policy should be subjected to more exacting review.").[6] That alone is reason enough to do the same here. *See Dickerson v. United States*, 530 U.S. 428, 443 (2000) ("[E]ven in constitutional cases," stare decisis "carries such persuasive force" that the Court has "always required a departure from precedent to be supported by some special justification.").

B. If the Court does reach the question, however, it should reaffirm intermediate scrutiny and the *Central Hudson* test. For more than thirty-five years, *Central Hudson* has been the applicable First Amendment standard for restrictions on commercial speech. In that time, the test has proved itself well suited to root out and repudiate government restrictions on speech that are unrelated to protecting consumers. That this Court has upheld only a handful of restraints under *Central Hudson* belies amici's concern that the test does not adequately protect First Amendment values.

Central Hudson is itself a form of heightened scrutiny. "The *Central Hudson* test is significantly stricter than the rational basis test, ... requiring the Govern-

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[6] *See also, e.g.*, *Sorrell*, 564 U.S. at 571; *Thompson*, 535 U.S. at 367-68; *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554-55 (2001); *Greater New Orleans Broad. Ass'n*, 527 U.S. at 184.

ment not only to identify specifically a substantial interest to be achieved by the restriction on commercial speech, but also to prove that the regulation directly advances that interest and is not more extensive than is necessary to serve that interest." *Thompson*, 535 U.S. at 374 (internal quotation marks and citations omitted). The state's burden is a "heavy" one, *44 Liquormart*, 517 U.S. at 516, requiring actual evidence—not just "speculation or conjecture"—that each part of the test is satisfied, *Edenfield*, 507 U.S. at 770. Restraints imposed to keep consumers in the dark or to manipulate consumer choice cannot pass that test, and such restraints therefore "rarely survive constitutional review." *44 Liquormart*, 517 U.S. at 504.[7]

At the same time, this Court has also "always been careful to distinguish commercial speech from speech"—like political expression—"at the First Amendment's core." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995). This "common-sense distinction" between commercial and noncommercial speech stems from commercial speech's "subordinate position in the scale of First Amendment values." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978) (internal quotation marks omitted). "[R]estrictions on commercial speech do not often repress individual self-expression" and "rarely interfere with the functioning of democratic political processes." *Thompson*, 535 U.S. at 388 (Breyer, J., dissenting). Commercial

[7] The one exception is *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), where an advertising ban was imposed to suppress demand for casino gambling by residents of Puerto Rico. But in separate opinions, all nine justices in *44 Liquormart* agreed that *Posadas* is no longer good law. 517 U.S. at 509-14 (opinion of Stevens, J.).

speech is also typically more robust than other forms of expression—given the profit motive, "there is little likelihood of its being chilled by proper regulation and forgone entirely." *Va. State Bd. of Pharmacy*, 425 U.S. at 771 n.24. For those reasons, this Court "has concluded that, from a constitutional perspective, commercial speech does not warrant application of the Court's strictest speech-protective tests." *Thompson*, 535 U.S. at 388 (Breyer, J., dissenting).

Moreover, commercial speech "occurs in an area traditionally subject to government regulation." *Ohralik*, 436 U.S. at 455-56. And the state has an important interest in protecting the public from "commercial harms" in that area. *Discovery Network*, 507 U.S. at 426. Commercial-speech restrictions "often reflect a democratically determined governmental decision to regulate a commercial venture in order to protect, for example, the consumer, the public health, individual safety, or the environment." *Thompson*, 535 U.S. at 388 (Breyer, J., dissenting).

The intermediate-scrutiny test therefore recognizes that government has a legitimate need to regulate the communicative aspects of commercial transactions to protect consumers. *Va. State Bd. of Pharmacy*, 425 U.S. at 771-72 ("The First Amendment ... does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely."). The test gives governments more leeway to enact commercial regulations that affect speech, "allow[ing] modes of regulation that might be impermissible in the realm of noncommercial expression." *Ohralik*, 436 U.S. at 456. In the commercial-speech context, it is thus "appropriate to require that a commercial message appear in such a form, or include

such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive." *Va. State Bd. of Pharmacy*, 425 U.S. at 771 n.24. And even blanket prohibitions of speech are sometimes permissible, when those restrictions are narrowly tailored to protect consumers from false, misleading, overreaching, or privacy-invading forms of advertising. *See Went For It*, 515 U.S. 618; *Friedman*, 440 U.S. 1; *Ohralik*, 436 U.S. 447.

Under strict scrutiny, on the other hand, restrictions on speech are sustained "only in the most extraordinary circumstances." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983). "[I]t is the rare case in which a State" can satisfy that test by "demonstrat[ing] that a speech restriction is narrowly tailored to serve a compelling interest." *Williams-Yulee v. The Florida Bar*, 135 S. Ct. 1656, 1665-66 (2015). Applying strict scrutiny's "exacting" standard, *id.* at 1664, to commercial-speech restrictions would call into question a wide range of consumer-protection laws whose constitutionality has thus far been unquestioned. *See Reed*, 135 S. Ct. at 2235 (Breyer, J., concurring) (noting the wide range of content-based laws, from securities regulation to "signs at petting zoos," that would be imperiled under strict scrutiny); Shanor, *The New Lochner*, 2016 Wis. L. Rev. at 173-74. That would risk returning the Court "to the bygone era of *Lochner v. New York*, 198 U.S. 45 (1905), in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies." *Sorrell*, 564 U.S. at 585 (Breyer, J., dissenting) (internal quotation marks omitted); *see generally* Shanor, *The New Lochner*, 2016 Wis. L. Rev. 133.

Applying strict scrutiny to commercial-speech restrictions would have an additional consequence. "To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech." *Ohralik*, 436 U.S. at 456. To avoid striking down many common economic regulations, strict scrutiny would have to be weakened. And that would mean less constitutional protection for core First Amendment speech.

In short, *Central Hudson* has worked well because it places a heavy, but not insurmountable, burden on government to demonstrate that its interest in protecting consumers from fraud, deception, or overreaching is substantial and that it has tailored its speech restraints as narrowly as possible. "[S]ome such approach is necessary if the First Amendment is to offer proper protection in the many instances in which a statute adversely affects constitutionally protected interests but warrants neither near-automatic condemnation (as 'strict scrutiny' implies) nor near-automatic approval (as is implicit in 'rational basis' review)." *United States v. Alvarez*, 132 S. Ct. 2537, 2552 (2012) (Breyer, J., concurring).

CONCLUSION

This Court should reverse the judgment of the court of appeals under an intermediate standard of scrutiny.

Respectfully submitted,

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